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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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June 25, 2009

Honorable Sonia Sotomayor
c/o The Department of Justice
Washington, D.C.

Dear Judge Sotomayor:

As noted in my letter to you dated June 15, 2009, I am writing to alert you to another subject which I intend to cover at your hearing. I appreciate your comment at our meeting that you welcome such advance notice.

In an electronic era where the public obtains much, if not most, of its news and information from television, there is a strong case in my judgment that the Supreme Court of the United States should have its public proceedings televised just as the United States House of Representatives and United States Senate are televised.

It is well established that the Constitution guarantees access to judicial proceedings to the press and the public. In 1980, the Supreme Court relied on this tradition when it held in Richmond Newspapers, Inc. v. Virginia, that the right of a public trial belongs not just to the accused but to the public and the press as well. The Court noted that such openness has "long been recognized as an indisputable attribute of an Anglo-American trial."

The value of transparency was cogently expressed by Chief Justice William Howard Taft who said:

"Nothing tends more to render judges careful in their decision and anxiously solicitous to do exact justice than the consciousness that every act of theirs is subject to the intelligent scrutiny of their fellow men and to candid criticism."

In the same vein, Justice Felix Frankfurter said:

"If the news media would cover the Supreme Court as thoroughly as it did the World Series, it would be very important since 'public confidence in the judiciary hinges on the public perception of it'."

To give modern-day meaning, the term "press" used in Richmond Newspapers would include television. Certainly Justice Frankfurter's use of the term "media" would include television in today's world. Televising the Supreme Court's public proceedings would provide the "scrutiny" sought by Chief Justice Taft.

Justices of the Supreme Court have been frequently televised, including Chief Justice Roberts and Justice Stevens appearance on "Prime Time" ABC TV, Justice Ruth Bader

Ginsburg's interview on CBS by Mike Wallace, Justice Breyer's participation in Fox News Sunday and the debate between Justice Scalia and Justice Breyer filmed and available for viewing on the web.

Many of the justices have commented favorably on televising the Court. Justice Stevens, in an article by Henry Weinstein on July 14, 1989 said he supported cameras in the Supreme Court and told the annual Ninth Circuit Judicial Conference at about the same time that, "In my view, it is worth a try." During Justice Breyer's confirmation hearing in 1994, he indicated support for televising Supreme Court proceedings. He has since equivocated, but noted that it would be a wonderful teaching device.

In December 2000, Marjorie Cohn's article noted Justice Ruth Bader Ginsburg's support of camera coverage so long as it was gavel to gavel. Justice Alito in his Senate confirmation hearing said that as a member of the Third Circuit Court of Appeals he voted to admit cameras; but added that it would be presumptive of him to take a final position before he had consulted with his colleagues, if confirmed, promising to keep an open mind. Justice Kennedy, according to a September 10, 1990 article by James Rubin, told a group of visiting high school students that cameras in the Court were "inevitable." He has since equivocated, stating that if any of his colleagues raise serious objections, he would be reluctant to see the Court televised. Chief Justice Roberts said in his confirmation hearing that he would keep an open mind on the subject.

Recognizing the sensitivity of justices to favor televising the Court in the face of a colleague's objection, there may be a new perspective with Justice Souter's retirement since he expressed the most vociferous opposition:

"I can tell you the day you see a camera come into our courtroom, it is going to roll over my dead body."

In the 109th and 110th Congresses, with several bipartisan co-sponsors, I introduced legislation providing for televising public Supreme Court proceedings. Both bills were reported favorably out of the Judiciary Committee, but were never taken up by the full Senate. Sensitive to separation of powers and recognizing the authority of the Supreme Court to invalidate any such legislation, it should be noted that there are analogous directives from Congress to the Court on procedural/administrative matters such as setting the first Monday of October as the beginning of the Court's term, requiring six sitting justices to form a quorum and establishing nine as the number of Supreme Court justices. In May 2007, Associate Professor Bruce Peabody of the Political Science Department of Fairleigh Dickinson wrote an article in the Journal on Legislation concluding the proposed legislation was constitutional.

There is obviously enormous public interest in Supreme Court proceedings. When the case of Bush v. Gore was argued, streets around the Supreme Court building were filled with television trucks, although no camera was admitted inside the chamber. Shortly before the argument, Senator Biden and I wrote to Chief Justice Rehnquist urging that the proceedings be televised and received a prompt reply in the negative; but the Supreme Court did break precedent by releasing an audiotope when the proceedings were over and the Court has since intermittently

made audiotapes available. Such audiotapes are obviously no substitute for television, but are a step in the right direction..

The keen public interest is obvious since the Supreme Court decides the cutting-edge questions of the day such as: who will become president; congressional power; executive power; defendants' rights – habeas corpus – Guantanamo; civil rights – voting rights – affirmative action; abortion.

In 1990, the Federal Judicial Conference authorized a three-year pilot program allowing television coverage of civil proceedings in six federal district courts and two federal circuit courts. The program began in July 1991 and ran through December 31, 1994. The Federal Judicial Center monitored the program and issued a positive final evaluation. The Judicial Center concluded: "Overall, attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program." The Judicial Center also said: "Judges and attorneys who had experience with electronic media coverage under the program generally reported observing small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice."

I am especially interested in your experience when a trial was televised in your courtroom under the pilot program.

My questions are:

- (1) Do you agree with Justice Stevens that televising the Supreme Court is "worth a try"?
- (2) Do you agree with Justice Breyer that televising judicial proceedings would be a wonderful teaching device?
- (3) Do you believe, as expressed by Justice Kennedy, that televising the Supreme Court is "inevitable"?
- (4) What effect, if any, did televising the trial in your Court have on the lawyers, witnesses, jurors and you?
- (5) Do you think that televising the trial in your Court was useful to inform the public on the way the judicial system operates?

Sincerely,



Arlen Specter

AS/ph

Via Facsimile and electronic mail